IN THE SUPREME COURT OF IOWA

Case No. 12-2120

Polk County
No. LACL 124195

Christopher J. Godfrey
Plaintiff/Appellant

v.

State Of Iowa; Terry Branstad, Kimberly Reynolds, Jeffrey Boeyink, Brenna Findley, Timothy Albrecht, and Teresa Wahlert
Defendants/Appellees

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY, IOWA
THE HONORABLE ROBERT A. HUTCHISON

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ROUTING STATEMENT

This case should be retained by the Supreme Court in accordance with Iowa R. App. P. 6.1101(2)(d) because it is a fundamental and urgent issue of broad public importance requiring prompt or ultimate determination by this Court.

STATEMENT OF THE CASE

Nature of the Case

This action concerns the scope of immunity and the protections afforded by the Iowa Tort Claims Act ("ITCA") to state officials and employees. After being sued by Plaintiff, Defendants were dismissed from the case pursuant to the statutory provisions of Iowa Code § 669.5. The District Court correctly held that the statute was clear and did not permit any judicial review of the attorney general's certification that the Defendants were state employees acting within their line of duty. Plaintiff brought this action seeking to create a judicial review process in the ITCA where none exists.

Defendants ask this Court to continue to uphold the protections of the ITCA, which protect the state and its employees not just from liability, but from suit, and continue to respect the legislative prerogative in defining the scope of governmental immunity.

Procedural Background

Appellees agree with the Appellant's statement of the procedural history.

STATEMENT OF THE FACTS

Essentially the only facts relevant to this appeal are procedural facts, which Appellant correctly sets out in his Statement of the Case, found in section VII of his brief. The Appellees summarize it here for ease of reading.

Plaintiff sued the Individual Defendants and the state for, *inter alia*, intentional interference with contract, defamation, extortion, and various constitutional violations. (App. at A-15–A-30.) The attorney general, acting pursuant to his statutory duty, certified that the Defendants were acting within their scope of employment, as defined in ITCA. (*See generally* App. at A-32–A-33.) After the certification was filed with the Court, Defendants applied to the Court to be dismissed from the case pursuant to the provisions of Iowa Code § 669.5. (*See generally* App. at A-34–A-37.) Plaintiff resisted. (*See generally* App. at A-38–A-41.)

The Court held a hearing on the matter. During the hearing Plaintiff conceded that one of the key cases it relied on was based on a statutory scheme that was different than the ITCA. (App. at A-57.) The District Court correctly recognized Plaintiff conceded the Oregon case law was inapplicable and that the *Mills* decision from the Southern District of Iowa was persuasive in finding that there was no judicial review of attorney

general certification required or permitted by Iowa Code § 669.5. (App. at A-74–A-81.)

SUMMARY OF THE ARGUMENT

Iowa Code § 669.5 is a constitutional statute which provides that after the attorney certifies that state employees were acting in their line of employment, the state is substituted as the sole defendant in their places. This statutory mechanism has been recognized the Southern District of Iowa and this Court has also suggested that the very procedure employed in this case was correct. This procedure protects one of the most important features of immunity—that employees and the state are immune from suit and not just liability. Plaintiff's citations to federal cases and cases from other states are inapplicable because the statutory schemes that formed the basis for those decisions are significantly different from the ITCA.

This Court should recognize that either as applied or on its face there are no constitutional infirmities with Iowa Code § 669.5. Plaintiff had no property interest in suing the state because his cause of action never accrued. As immunity is waived solely by statute, no cause of action exists where the statute does not waive the state's immunity. Further, the section's plain text does not require or permit review of the attorney general's decision on certification. This Court should decline to rewrite an unambiguous statute, and the decision of the District Court should be affirmed.

ARGUMENT

I. THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED BECAUSE IOWA CODE § 669.5 IS CLEAR THAT THE ATTORNEY GENERAL'S CERTIFICATION RESULTS IN THE STATE BEING SUBSTITUTED AS THE SOLE DEFENDANT

A. PRESERVATION OF ERROR

The Appellees agree that the Appellant preserved error on the arguments made in sections IX.A, IX.B, IX.C, and IX.E of his brief; however, error was preserved not by the filing of an interlocutory appeal, instead by Appellant raising these issues at the District Court. But, at the District Court, Plaintiff conceded that the Oregon Tort Claims Act is different than the ITCA, and thus, error was not preserved on any argument based on cases from Oregon courts. (*See* App. at A-57. ("In Alaska the language [of the tort claims act] is very close to ours. In Oregon I don't think it really is. The Oregon statute is different.")

B. SCOPE AND STANDARD OF APPELLATE REVIEW

The Appellees agree with the Appellant's statement on standard and scope of appellate review. It is axiomatic that a statutory interpretation is reviewed for errors at law. In such a review, the court must look first to the language of the statute as a whole to give it "its plain and obvious meaning."

State v. Booth, 670 N.W.2d 209, 211 (Iowa 2003) (citations omitted). Only if necessary will the Court look to "prior decisions of this court and others, similar statutes, dictionary definitions, and common usage." *Id.* (citations omitted).

C. DEFENDANTS/APPELLEES' CONTENTIONS

Plaintiff furtively attempts to convince this Court that Iowa Code § 669.5 is ambiguous, so that it can encourage the Court to invent, describe, and implement a judicial review process that the legislature did not create. This Court is "obliged to apply the pertinent statutes as written." *Area Educ. Agency 7 v. Bauch*, 646 N.W.2d 398, 400 (Iowa 2002) ("Only in cases of ambiguity do we resort to the rules of statutory construction."). This is especially true in the case of the ITCA. *See Trobaugh v. Sondag*, 668 N.W.2d 577, 580 (Iowa 2003) ("We approach [the task of interpreting the ITCA] carefully, with the delimited parameters and remedial purpose of the statute in mind.") The state may only be sued pursuant to the express terms of the ITCA, thus the Court must have "respect for the statutory parameters marked-out by the legislature in creating the act." *Id.*

i. Iowa Code § 669.5 Is Clear that Attorney General Certification Conclusively Establishes Scope of Employment

In a well-reasoned decision, the Southern District of Iowa discusses the lack of ambiguity in Iowa Code § 669.5. *See Mills v. Iowa Bd. of Regents*, 770 F. Supp. 2d 986, 994–96 (Iowa 2011). In that case, the plaintiff argued that the attorney general's certification that state-employee defendants were acting within the scope of their employment should be reviewed by the Court. *See id.* That plaintiff advanced many of the same legal principles and cases which are advanced by this Plaintiff. *See id.* In *Mills*, the argument that certification should be reviewed was clearly rejected by the court. *See id.* Judge Pratt recognized that the ambiguity present in the Westfall Act, which references the conclusiveness of attorney general certification in one part of a section and not in another, is not present in the ITCA. *See id.* There are no such conflicting references in the ITCA. *See* Iowa Code § 669.5. The conflicting references in the Westfall Act formed the basis for the U.S. Supreme Court's decision that the Westfall Act was ambiguous regarding certification. *See Mills*, 770 F. Supp. 2d at 995 (citing *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)). The lack of conflicting references regarding certification in the ITCA makes it unambiguous and makes the rationale of *Gutierrez de Martinez* inapplicable.

See id. The court in *Mills* recognized that the word "shall" imposed a duty to substitute the State as the Defendant, and no discretion or provisions for reviewing the Attorney General's decision are contained in the statute. *See id.* This Court should also apply the statute as written.

The plain language of the statute indicates that substitution is to occur immediately and without review. Iowa Code § 669.5 says that

> Upon certification by the attorney general that a defendant in a suit was an employee of the state acting within the scope of the employee's office or employment at the time of the incident upon which the claim is based, the suit commenced upon the claim shall be deemed to be an action against the state...

The phrase "shall be deemed" is a clear indication that the legislature intended the result that the individual defendant/employees are immediately dismissed. Iowa Code § 4.1(30) says that "'shall' imposes a duty." Black's Law Dictionary defines "deem" as "to treat (something) as if it were really something else." *Black's Law Dictionary* 446 (8th ed. 2004). The definition goes on to explain that in legislation, "deem" is intended to "establish a legal fiction" by deeming "something to be what it is not." Here, the action was a lawsuit against individual employees. (*See generally* App. at A-1–A-32.) According to the plain language of the statute, the District Court correctly treated Plaintiff's suit against the individual employees as if it were a suit against the state only. *See Black's Law Dictionary* 446 (8th ed. 2004); Iowa

Code § 4.1(30). The statute does *not* say, "If the district court determines the attorney general was correct, the suit commenced up on the claim shall be deemed to be an action against the state..." *See* Iowa Code § 669.5. Nothing in the text of Iowa Code § 669.5, the ITCA, or cases interpreting the ITCA permits the district court to create a review process.

The language in Iowa Code § 669.5(2)(b) provides for judicial determination only if the Attorney General refuses to certify. Clearly, given the absence of any similar provision in Iowa Code § 669.5(2)(a), the Iowa Legislature did not intend to provide judicial review when the Attorney General does certify that a Defendant was acting within his or her scope of employment. The Southern District recognized this in *Mills*. *See Mills*, 770 F. Supp. 2d at 995–96. This Court has noted that when it is "apparent that the legislature knew how to [include the sought-after provisions] had it wanted to do so," the Court should decline to expand the terms of the statute. *EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Agency*, 641 N.W.2d 776, 783 (Iowa 2002).

Recently, this Court reaffirmed that "legislative intent is expressed by omission as well as by inclusion." *Watson v. Iowa Dep't of Transp.*, 829 N.W.2d 566, 570 (Iowa 2013) (citing *Wiebenga v. Iowa Dep't of Transp.*, 530 N.W.2d 732, 735 (Iowa 1995). In *Watson*, this Court recognized that,

over the strong argument based on fairness advanced by the Appellant, the statute unambiguously did not include any references to an adjustment in the alcohol concentration test results for margin of error for commercial drivers. *See id.* at 570–71. Even though the alcohol concentration tests for commercial and noncommercial drivers were the same and the margin of error issues were the same, the Court was not swayed by the argument that there might be an erroneous deprivation of a CDL as a result of the failure to include any adjustment for margin of error in the calculations. *See id.* This Court wrote that "[t]he express directive requiring the margin of error adjustment in the noncommercial license context and the absence of any reference to such adjustment in the CDL context together inform our conclusion that the legislature never intended margin of error adjustment of CDL operator's test results." *See id.* at 570 (citing *Wiebenga*, 530 N.W.2d at 735). Also, reading the margin of error provision into the CDL statute would have rendered parts of the statutory scheme as surplusage or made the provision illogical. *See id.*

Reading an opportunity for judicial review in to Iowa Code § 669.5 would render parts of the ITCA as illogical and surplusage. Following the logic of *Watson* makes sense in the context of Iowa Code § 669.5. There is no reference in the section regarding attorney general certification to judicial

review. *See* Iowa Code § 669.5. The "express directive" of judicial review in Iowa Code § 669.5(2)(b) makes its absence in Iowa Code § 669.5(2)(a) even more striking and confirms that judicial review is *only* available where the attorney general refuses to certify the scope of employment issue. *See* Iowa Code § 669.5.

The purpose of the immunity protections of ITCA is to provide immunity from *suit*, not simply from *liability*. *Megee v. Barnes*, 160 N.W.2d 815, 816 (Iowa 1968), *overruled on other grounds by Kersten Co., Inc. v. Dept. of Soc. Services*, 207 N.W.2d 117 (Iowa 1973). Immunity protects interference with sovereignty and smooth functioning of the state. *See Collins v. State Bd. of Soc. Welfare*, 81 N.W.2d 4, 6 (Iowa 1957). Allowing a jury or judge to review the attorney general's certification through any type of evidentiary hearing turns this proposition on its head. Suddenly, instead of being able to quickly dismiss a suit where immunity protections are still in force, state officials would be forced to consume time and resources engaging in discovery, depositions, and lengthy hearings or even trials to determine the scope of employment issue. Nowhere in the text of ITCA, nor in any cases from this Court interpreting its text, is there any support for this interpretation. The reason is both obvious and compelling—such a result would render immunity meaningless.

Iowa Code § 669.5(2) is a mandatory, rather than a directory, statute. *See Pearson v. Robinson*, 318 N.W.2d 188, 191 (Iowa 1982). In *Pearson*, the Court noted that when the time of performance is "'essential to the main purpose of the legislation,'" the duty is mandatory. *See id.* (citing *Taylor v. Dept. of Transp.*, 260 N.W.2d 521, 522–24 (Iowa 1977). In both *Taylor* and *Pearson*, the Court was addressing statutes concerning time periods, rather than a substantive right. *See id.* The Court found that a later filing, as in *Pearson*, or a later hearing, as in *Taylor*, still served the purpose of the statute. Here, to the contrary, a later substitution does not serve the purpose of maintaining governmental immunity from *suit* and not just from *liability*. *See Megee*, 160 N.W.2d at 816.

This Court has suggested that Iowa Code § 669.5's requirements are mandatory and no review is necessary; after writing that "... as long as the employee was acting within the scope of employment at the time of the incident at the center of the lawsuit, the suit is deemed to be an action against the state." *McGill v. Fish*, 790 N.W.2d 113, 117 (Iowa 2010). The *McGill* Court footnoted that "[a] lawsuit commenced against a state employee who is alleged to have been acting within the scope of employment at the time of the incident giving rise to the claim is subsequently deemed to be an action against the state upon the occurrence of

one of two events"; the first is certification, and the second is a court determination, in the event of a failure to certify. *See id.* n.3. Nowhere did this Court suggest that judicial review is necessary when the attorney general provides a certification.

To promote the creation of this process, Plaintiff attempts to confuse the issue by suggesting defamation and extortion can never be within an employee's scope of employment. This argument has serious logical flaws. First, ITCA provides a broader definition of "[a]cting within the scope of the employee's office or employment" than that used in the common law. Section 669.2 requires only that the individual be "acting in the employee's line of duty as an employee of the state." Iowa Code § 669.2 (2011). This Court has repeatedly recognized that "the legislature may be its own lexicographer." *Graham v. Worthington*, 146 N.W.2d 626, 632 (Iowa 1966) (citations omitted). This court should not rewrite the ITCA by adopting the common law definition of scope of employment.

In contrast, the cases cited by Plaintiff refer to the common law definition, which requires that the "conduct complained of must be of the same general nature as that authorized or incidental to the conduct authorized." *See Sandman v. Hagan*, 154 N.W.2d 113, 117 (Iowa 1967). Under the common law definition, if an act could be seen to further the employer's business or

interest, it could be within the scope of employment *Id.* This "furtherance" requirement is not in the ITCA. Adopting the common-law definition and following the common-law procedure of submitting this issue to a factfinder would overturn the statutory scheme of the ITCA, which the Court should not and cannot do. *See Snyder v. Davenport*, 323 N.W.2d 225, 228 (Iowa 1982).

Additionally, looking at a state employee's actions for scope of employment purposes through the Plaintiff's conclusory lens renders the ITCA definition of scope of employment meaningless. Imagine a situation where a state employee is traveling from Des Moines to an inspection in a corner of the state. On the way, he or she operates a state motor vehicle in a negligent fashion, which results in the death of a pedestrian. This is indisputably an action done in the "employee's line of duty." *See* Iowa Code § 669.2. Viewed from the Plaintiff's skewed perspective, however, "killing" or "causing death" would almost never be in the "scope of employment." Applied to the ITCA, this strained conclusion would mean that state employees involved in car accidents or discretionary decisions like calling out the National Guard that result in a fatality would never be entitled to the protections of the ITCA. This was not the result intended by the legislature, and should not be adopted by this Court.

More specifically, in this case, Plaintiff suggests that defamation could never be in an employee's scope of employment. This assertion is contradicted by the clear language of the ITCA. The inclusion of defamation in Iowa Code § 669.14 necessarily means the legislature thought defamation, at least in some instances, could be within an employee's scope of employment. *See* Iowa Code § 669.14(4) (section also includes assault, battery and misrepresentation, among others). Section 669.23 protects employees from being personally liable for any claim[1] exempted under section 669.14, without exception. Thus, read together, these sections indicate that employees are protected from lawsuits based on defamation, assault, and battery when the actions which form the basis for that lawsuit are committed within their scope of employment.

Simply put, "private citizens may sue the State for the actions of a state employee but only in the manner and to the extent to which consent has been given by the legislature." *See Trobaugh*, 668 N.W.2d at 580. This right to sue is not absolute. This Court should decide that, consistent with the language, purpose, and legislative intent of the ITCA, the attorney general's decision that employees were acting within their scope of employment is not subject to judicial review.

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[1] Section 669.2's definition of "claim" includes the phrase "scope of employment." *See* Iowa Code § 669.2

ii. The Westfall Act is Sufficiently Different from the ITCA to Make It Inapplicable to This Case

Although the ITCA was modeled after the Westfall Act, it has some significant differences. This Court has noted that Federal Tort Claims Act cases are of utility in interpreting the ITCA only when the statutory language is identical. *Saxton v. State*, 206 N.W.2d 85, 86 (Iowa 1973) (citations omitted). Concerning attorney general certification and immunity protections provided for employees, the acts are different. Also, Iowa's independently-elected attorney general has more accountability than the U.S. attorney general and U.S. District Attorneys, which are appointed by the executive branch.

The Westfall Act was drafted "against a backdrop of judicial review." *Gutierrez de Martinez*, 515 U.S. at 425. The Court wrote that, "...federal judges traditionally proceed from the strong presumption that Congress intends judicial review." *Id.* at 424 (citations omitted). Also in *Gutierrez de Martinez*, the Attorney General was urging the Court to permit review of the certification decision. *See id.* at 424. Neither of these considerations is present here. This Court has written that "The right to appeal [an agency decision] is purely statutory and is controlled by section 17A.19." *See Neumeister v. City Dev. Bd.*, 291 N.W.2d 11, 14 (Iowa 1980) (citations omitted). The ITCA specifically states that it prevails over chapter 17A,

making cases interpreting the IAPA of no value. *See* Iowa Code § 669.1 ("Every provision of this chapter is applicable and of full force and effect notwithstanding any inconsistent provision of the Iowa administrative procedure Act, chapter 17A."). The case cited by Plaintiff supposedly entitling him to review in fact supports Defendants' position that ITCA prevails over the IAPA. *See Richards v. Iowa Dept. of Revenue and Fin.*, 454 N.W.2d 573, 574 (Iowa 1990) ("Agency action is reviewable '*[e]xcept as expressly provided otherwise by another statute referring to this chapter by name.*'" (quoting Iowa Code § 17A.19)); *see also* Iowa Code § 669.1 (providing that the ITCA controls over IAPA). No presumption of judicial review exists in Iowa for ITCA cases, and the Attorney General does not request that the Court review his actions.

Additionally, the Westfall Act does not contain a provision similar to Iowa Code § 669.23. Section 669.23 ameliorates the concerns expressed by the Supreme Court in *Gutierrez de Martinez* regarding the benefits of certification to the government and its employees. *See Gutierrez de Martinez,* 515 U.S. at 427–28 (certification could result in a claim which would have succeeded against an individual being dismissed against the United States resulting in a pecuniary incentive to certify). By making the scope of immunity coextensive for the State and its employees, the

legislature avoided this possible policy concern with the attorney general's certification. *See Dickerson v. Mertz*, 547 N.W.2d 208, 212–13 (Iowa 1996).

Plaintiff's claims, in addition to being prohibited against the State under Iowa Code § 669.14, cannot be made against the individual defendants. Iowa Code § 669.23 states that "[e]mployees of the state are not personally liable for any claim which is exempted under section 669.14." Iowa Code § 669.23 (2011). In section 669.23, the legislature made clear that personal liability was not available against state employees where the legislature has maintained the state's immunity. *See id.* For instance, section 669.23 makes state employees immune from claims of defamation, like those made by Plaintiff, because defamation is one of the section 669.14 exemptions. *See id.*; *see also* Iowa Code § 669.14 (2011). This Court recognized this immunity when it wrote, "All employees are granted immunity for exempted claims, i.e., claims that do not fall within the State Tort Claims Act." *Hook v. Lippolt*, 755 N.W.2d 514, 520 (Iowa 2008).

Plaintiff cannot maintain his claims, as defined in section 669.2(3), that fall under the provisions of section 669.14.[2] The Attorney General has certified that the Defendants were "acting within the scope of the employee's

[2] Plaintiff has conceded that Counts X, XI, XII, XIII, XIV and XV fall under the scope of Iowa Code § 669.14 and cannot be maintained against the State. (*See* A-75, A-78.) Thus, implicitly the Plaintiff has conceded that Iowa Code § 669.23 would bar his claims.

office or employment." *See* Iowa Code § 669.2(1). Thus, the allegations by Plaintiff are "claims" and fall under the provisions of the ITCA. *See id.* Under ITCA, if the employees are substituted out, as they were in this case, the State becomes the sole defendant and is then able to employ the exemptions in section 669.14. If the employees are not substituted, they can employ the protections of section 669.23, which allow the very same claims to be dismissed. *See* Iowa Code § 669.23. The protections of section 669.23, in combination with those contained in section 669.5, evidence the legislature's intent to provide employees with protection coextensive to that of the State. *See Dickerson*, 547 N.W.2d at 212–13. These sections fit within a comprehensive plan where immunity is the rule, and exceptions are only those actually created by the legislature. *See Harden v. State*, 434 N.W.2d 881, 886 (Iowa 1989).

iii. Alaska and Oregon Have Different Immunity Laws, Which Makes Their Cases Inapplicable to the ITCA

Plaintiff's citation to an Alaska case is inappropriate because Alaska's tort claims act and its law on immunity differ from Iowa's in two important ways. First, Alaska's tort claims act does not include a provision similar to Iowa Code § 669.23. *See generally* Alaska Stat. §§ 09.50.250, 09.50.253. Second, in Alaska, immunity is the exception because it is waived in the state constitution. *See State, Dept. of Corrections v. Heisey*, 271 P.3d 1082, 1094

(Alaska 2012) ("... in Alaska, the government generally is liable for its wrongs, while immunity is the exception."); *see also* Ala. Const. art. 2, § 21. In Iowa, immunity is waived only to the extent provided by the legislature. *See Harden*, 434 N.W.2d at 886 ("State tort claims are unique. In such claims, immunity is still the rule. Lawsuits may be maintained only to the extent that immunity has been expressly waived by the legislature."); *see also Walker v. State*, 801 N.W.2d 548, 555 (Iowa 2011) ("A governmental entity is entitled to immunity only to the extent permitted by statute.").[3] Thus, while Alaska must always maintain some sort of governmental liability, the Iowa legislature could completely abolish it. *See, e.g., Montandon v. Hargrave Constr. Co.*, 130 N.W.2d 659, 660 (Iowa 1964) (narrowing or abrogating immunity is for the legislature not the judiciary). In addition, Alaska's attorney general is an appointed, rather than elected, official. *See* Ala. Const. art 3, § 25; Iowa's independently elected attorney general is more likely to be unbiased, as he is accountable the electorate, rather than the governor. The policy rationale which formed the basis for the Alaska court's decision

[3] Appellees acknowledge that the language of *Walker* could be read in a strained fashion to suggest that liability is the rule in Iowa. However, history and significant portions of this Court's precedent point to the opposite conclusion. *Walker* stands for the proposition that under ITCA immunity is the exception and exemptions are narrowly construed. The long-standing proposition that the statutory text of ITCA creates the contours of the waiver of immunity is unchanged. *See id.*

is inapplicable to the ITCA because of the noticeable differences in the statutory and constitutional schemes.

Plaintiff failed to preserve error by correctly conceding at the District Court hearing that the Oregon tort claims act is different from the ITCA. Thus, his citation to a decision interpreting Oregon's tort claims act is of no value because the Oregon act is markedly different from the Iowa Act.[4] The attorney general certification requirement in Oregon is not tied to substitution; instead, it is tied to whether the attorney general will defend the employee. *See* Or. Rev. Stat. § 30.285. The language regarding substitution, in section 30.265, with language about making an "appropriate motion," is separate and apart from the attorney general certification in section 30.285, discussing whether an employee is entitled to a state-funded defense. *See* Or. Rev. Stat. §§ 30.265, 30.285 Thus, Oregon cases are not appropriate for the interpretation of Iowa Code § 669.5, which directly connects attorney general certification and substitution of the State in place of individual defendants.

Additionally, in Oregon, protections for employees similar to those found in Iowa Code § 669.23 do not exist. In *Berry*, the Oregon Court of

[4] For instance, the Oregon act contains damage caps. *See, e.g.*, Or. Rev. Stat. § 30.273. This limit on the amount recoverable against the state of Oregon provides reasons for Oregon courts to review attorney general certifications. No such caps exist in Iowa, and as such, the additional policy reasons for reviewing an attorney general certifications do not exist. Plaintiffs can make the same recovery against individuals that they can against the State.

Appeals wrote, "[I]f the claim does *not* arise out of an act or omission in the performance of duty, the employee is not entitled to a defense and is the only proper defendant. The plaintiff would then be limited to a remedy against the employee individually." *Berry v. State, Dept. of Gen. Services*, 917 P.2d 1070, 1072 (Or. App. 1996) (emphasis in original). The court in *Berry* also notes that the Oregon legislature had no intent to grant state employees immunity for individual torts. *See id.* In Iowa, if the claim, as defined in ITCA, was covered by an exemption in Iowa Code § 669.14, there is *no* cause of action against state employees, *i.e.* they are granted immunity. *See* Iowa Code § 669.23.

II. THE IOWA TORT CLAIMS ACT IS CONSTITUTIONAL, BOTH ON ITS FACE AND AS APPLIED

A. PRESERVATION OF ERROR

The Appellees agree that the Appellant preserved error on the arguments made in section IX.D of his brief; however, error was preserved not by the filing of an interlocutory appeal, instead by Appellant raising these issues at the District Court, and the fact that Appellant's contentions were addressed by the District Court in its opinion.

B. SCOPE AND STANDARD OF APPELLATE REVIEW

The Appellees agree that constitutional issues are reviewed *de novo*.

C. DEFENDANTS/APPELLEES' CONTENTIONS

The District Court correctly recognized that the ITCA was constitutional. Plaintiff's suggestion that the District Court's action or the attorney general certification process was unconstitutional and thereby deprived him of his property rights is without merit. This Court in *McGill* did not suggest that there was any constitutional infirmity in Iowa Code § 669.5's requirements, which it noted were mandatory and did not require review. *McGill*, 790 N.W.2d at 117. Nowhere did this Court suggest that failure to provide judicial review of an attorney general's certification is unconstitutional.

This Court also addressed the constitutionality of the entirety of chapter 669 and found no constitutional infirmity. *See Graham*, 146 N.W.2d at 638 (upholding constitutionality of the ITCA). Finding that complete immunity, which resulted in far more significant "deprivations" than those complained of by Plaintiff here, was constitutional, this Court recognized that issues of immunity are for the legislature, not the judiciary. *Montandon*, 130 N.W.2d at 660. Plaintiff urges this Court to rewrite the ITCA; it declined to create new law abrogating immunity in 1964, and should continue to decline intrusion into the legislative arena.

Neither the *Heisey* decision from Alaska nor the *Berry* decision from Oregon expressly considered the constitutional challenge Plaintiff attempts to present here; the decisions were made primarily on statutory construction and policy grounds. *See Heisey*, 271 P.3d at 1089–90; *Berry*, 917 P.2d at 1072; Although some constitutional underpinnings may have been present in those decisions, because the Iowa Supreme Court has already addressed the constitutionality of the ITCA, the Court should decline Plaintiff's request to create new constitutional issues out of whole cloth where none exist. *See Graham*, 146 N.W.2d at 638 (upholding constitutionality of ITCA); *see also Hensler v. City of Davenport*, 790 N.W.2d 569, 578 (Iowa 2010) ("statutes are cloaked with a presumption of constitutionality").

This Court has found that "[t]he right to sue the government is not a property right subject to due process protection." *Harden*, 434 N.W.2d at 886. Plaintiff never had a right to sue the state on causes of action for which the state and its employees retain immunity. *See, e.g.*, Iowa Code §§ 669.14, 669.23. Because immunity is determined by the ITCA, it is a nonsensical argument for Plaintiff to argue he had rights other than those created by the statute. *See, e.g., Trobaugh*, 668 N.W.2d at 580. Given these limitations, which include the attorney general certification, no cause of action accrued, so Plaintiff had no property interest in suing the state for any action for

which the state is immune. Thus, he could not be deprived of any property interest.

Because the terms of the statute control the contours of immunity, Plaintiff's attempt at making an as-applied challenge to the statute collapses into a facial challenge. Plaintiff sets forth no meaningful distinction between the two. This Court has already held that the ITCA is constitutional in its entirety, and Plaintiff provides no sound reason to depart from that holding. *See Graham*, 146 N.W.2d at 638. Because statutes are given a presumption of constitutionality, there is no basis for the Court to determine that section 669.5(2)(a) is unconstitutional. Plaintiff's claim that he is entitled to additional due process protection and was deprived of his substantial rights by the District Court's decision must fail.

CONCLUSION

Plaintiff has no property interest in being able to sue the State because the provisions of Iowa Code chapter 669 prevented his causes of action from accruing. Thus, the statute in no way deprives him of due process. It is axiomatic that the state is not required to provide process when it does not take something, but merely prevents the property interest from coming in to existence. This Court has long recognized that the ITCA is constitutional in its entirety and that issues of immunity are best left to the legislature.

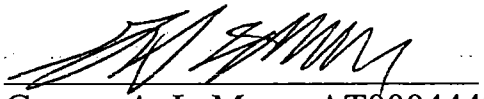
The legislature clearly defined the attorney general certification process in Iowa Code § 669.5.. While the attorney general's failure to certify triggers a review process, the statute does not provide any review for a certification that employees were acting within the scope their employment. This lack of ambiguity distinguishes the ITCA from its federal analog. Differences between the ITCA and other states' tort claims acts make cases interpreting those acts of little value. This Court should uphold the purpose of immunity—protecting the state and its employees from suit—by finding that the attorney general's certification that an employee was acting in the scope of employment is conclusive.

REQUEST FOR ORAL SUBMISSION

The Appellees respectfully request that this case be submitted with oral argument as it is necessary to the resolution of the issues presented.

Respectfully Submitted,

LaMARCA & LANDRY, P.C.



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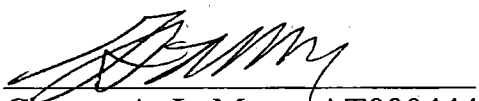
CERTIFICATE OF COSTS

The Appellees hereby certifies that the cost of this Brief and Argument was $ 98.29 , and this sum has been paid.

LaMARCA & LANDRY, P.C.



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PROOF OF FILING & CERTIFICATE OF SERVICE

I certify that on June 25, 2013, I served the attached Appellees' Proof Brief on all other parties to this appeal by mailing one copy to the following counsel for the parties at the following addresses:

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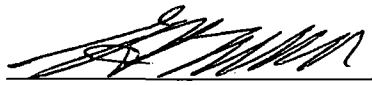
I further certify that on June 25, 2013, I filed this document by hand-delivering eighteen copies to the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1st Floor, 1111 East Court Avenue, Des Moines, Iowa 50319.

LaMARCA & LANDRY, P.C.



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